December 9, 2004

DRAFT

By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: **EX PARTE**
T-Mobile USA, Inc.-Western Wireless Corp.-Nextel Communications-Nextel Partners Petition for Declaratory Ruling (CC Docket No. 01-92)

Dear Ms. Dortch:

On December 8, 2004, Michael Altschul, Diane Cornell, Paul Garnett, and Carolyn Brandon of CTIA — The Wireless Association,™ Harold Salters and Lorrie Turner of T-Mobile USA, Inc., Mark Rubin of Western Wireless Corporation, and Cheryl Tritt of Morrison & Foerster LLP met with Jeff Carlisle, Lisa Gelb, Jeremy Marcus, Steve Morris, Victoria Goldberg, and Rob Tanner of the Wireline Competition Bureau, and David Furth of the Wireless Telecommunications Bureau to discuss the petition for declaratory ruling filed jointly by T-Mobile, Western Wireless Corporation, Nextel Communications, and Nextel Partners ("Joint Petition") in the above-referenced proceeding. The parties provided talking points at the meeting, a copy of which is attached.

The parties reiterated arguments advanced in the Joint Petition, which seeks clarification that wireless termination tariffs unilaterally filed by local exchange carriers ("LECs") with multiple state public utility commissions are unlawful under the Communications Act of 1934, as amended ("Act"). In particular, the parties noted that the existing regulatory framework, as established by Congress and implemented by the Commission, contemplates that voluntarily negotiated or arbitrated interconnection agreements, not unilaterally imposed tariffs, will govern the relationships between interconnecting carriers.[1]

[1] *See Verizon North, Inc. v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002) ("*Verizon North I*"), *cert. denied*, 538 U.S. 946 (2003) (federal process involving "private negotiation and arbitration aimed at creating interconnection agreements" is "central to the [1996 Telecommunications] Act").

The parties further asserted that, as the Commission ruled in the *Local Competition Order*, wireless carriers have the same interconnection rights as competitive LECs and other telecommunications carriers under Sections 251 and 252 of the Act, even though they do not have the same obligations as incumbent LECs under those provisions.[2] The Commission expressly stated that "CMRS providers meet the statutory definition of 'telecommunications carriers" and "'[i]ncumbent LECs must accordingly make interconnection available to these providers in conformity with the terms of Sections 251(c) and 252."[3] Accordingly, wireless carriers are entitled to avail themselves of the same interconnection procedures available to competitive LECs under the Act, and rural LECs cannot circumvent these procedures merely by filing unilateral tariffs. These tariffs "short-circuit" negotiations and therefore thwart the federal process under Sections 251 and 252 by removing incentives for rural LECs to negotiate in good faith for terms and rates that may be less favorable than those under their tariffs.[4]

Additionally, the parties noted that, even if Sections 251 and 252 of the Act do not expressly require wireless carriers to respond to a request for interconnection from a rural LEC, the Commission consistently has exercised its authority under Sections 201 and 332 of the Act to require wireless carriers to negotiate in good faith with LECs for interconnection.[5] In implementing its authority under Sections 201 and 332, the Commission adopted Section 20.11 of its rules, which applies to wireless carriers and LECs, and incorporates by reference Part 51 of the Commission's rules implementing Sections 251 and 252 of the Act. In particular, Section 20.11(b)(2) of the Commission's rules expressly requires wireless carriers to pay "reasonable compensation" to LECs for traffic termination.[6] Section 20.11(c) states that LECs and wireless carriers "shall also comply with applicable provisions of part 51 of this chapter."[7] Thus, pursuant to Sections 201 and 332 of the Act and Section 20.11 of the Commission's rules, wireless carriers are subject to the applicable interconnection rules of Part 51.

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[2] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 1005, 1012 (1996) ("*Local Competition Order*").

[3] *Id.* ¶ 1012.

[4] *See Wisconsin Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003), *cert. denied*, 157 L.Ed. 2d 953 (Jan. 12, 2004); *Verizon North I* at 943; *Verizon North Inc. v. Strand*, 367 F.3d 577, 585 (6th Cir. 2004).

[5] *See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411, ¶ 229 (1994) ("allow[ing] LECs to negotiate the terms and conditions of interconnection with cellular carriers" and "require[ing] these negotiations to be conducted in good faith"); *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 RR2d 1275 (1986) ("we must leave the terms and conditions to be negotiated in good faith between the cellular operator and the telephone company").

[6] *See* 47 C.F.R. § 20.11(b)(2).

[7] *See id.* § 20.11(c).

Implicit in the obligation to negotiate in good faith is an obligation to negotiate within a reasonable period of time. To determine what constitutes a reasonable period, the Commission has full authority under Sections 201 and 332 of the Act to consider the timeframes prescribed under Section 252 for negotiating and arbitrating interconnection agreements. Moreover, in the *Local Competition Order*, the Commission declared that "actions that are intended to delay negotiations or resolution of disputes are inconsistent with the statutory duty to negotiate in good faith."[8] Thus, a carrier's refusal to submit to arbitration after the parties have failed to reach agreement within a reasonable period of time could be deemed a breach of the duty to negotiate in good faith. The Commission reasonably could construe the obligation to negotiate in good faith to require a wireless carrier to submit to a rural LEC's request for arbitration if the parties fail to reach agreement within the timeframes prescribed under Section 252. Consequently, rural LECs have a legally enforceable right to demand good faith negotiations and a remedy if negotiations collapse.

Allowing rural LECs to impose wireless termination tariffs would unnecessarily complicate and delay the Commission's resolution of the broader issues raised in the long-pending inter-carrier compensation reform proceeding. These tariffs permit one party to an interconnection arrangement to unilaterally impose onerous terms and rates that ultimately prevent consumers from enjoying the full benefits of competition, particularly intermodal competition. Moreover, the tariffs permit non-reciprocal payments only to rural LECs for traffic termination, in violation of the reciprocal compensation requirement of Section 251(b)(5) of the Act and Section 20.11(b)(1) of the Commission's rules. Consequently, sanctioning these tariffs would undermine the prospects of any meaningful federal reform of the existing inter-carrier compensation system and frustrate the pro-competitive goals of the Act.

[8] *Local Competition Order*, ¶ 154.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter is being filed electronically.

Respectfully submitted,

/s/ Michael Altschul
Michael Altschul

cc: Jeff Carlisle
Lisa Gelb
Jeremy Marcus
Steve Morris
Victoria Goldberg
Rob Tanner
David Furth
Aaron Goldberger